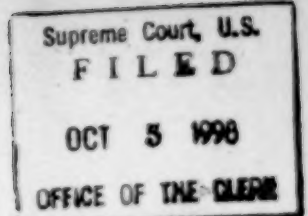


NOW 6 PAGE 1

No. 97-2048



IN THE
—SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,
Petitioner,

vs.

DARREN BOERCKEL,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NOW COMES the Respondent, DARREN BOERCKEL, by the undersigned appointed counsel, and pursuant to Rule 39.1 of this Court, respectfully requests leave to file the attached Brief in Opposition in forma pauperis.

Respondent is indigent and is incarcerated in the Illinois Department of Corrections at the Western Illinois Correctional Center. The undersigned counsel was appointed pursuant to 18 U.S.C. § 3006A to represent the respondent in both the United States District Court for the Central District of Illinois, Springfield Division, and the United States Court of Appeals for the Seventh Circuit.

13 PP

DARREN BOERCKEL,
Respondent

RICHARD H. PARSONS
Chief Federal Public Defender

BY: 

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COUNSEL FOR PETITIONER.

No. 97-2048

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,
Petitioner,

vs.

DARREN BOERCKEL,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE ISSUE OF WHETHER RESPONDENT
PROCEDURALLY DEFAULTED HIS CLAIMS SHOULD BE REVIEWED
WHERE THE DISTRICT COURT ERRONEOUSLY APPLIED AEDPA
REQUIREMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE?
2. WHETHER STATE LAW REQUIRED RESPONDENT TO SEEK REVIEW OF
EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER
TO AVOID FORFEITURE OF THOSE CLAIMS?
3. WHETHER THIS COURT SHOULD ADOPT A UNIFORM RULE REGARDING
THE EFFECT OF FAILING TO INCLUDE A CLAIM IN A PETITION FOR
LEAVE TO APPEAL TO A STATE SUPREME COURT WHEN THE STATES DO
NOT HAVE UNIFORM RULES REGARDING SUCH PETITIONS?
4. WHETHER THE SEVENTH CIRCUIT WAS CORRECT IN DETERMINING
THAT ILLINOIS RULE WHICH DISCOURAGED LITIGANTS FROM RAISING
EVERY POSSIBLE CLAIM OF ERROR DID NOT REQUIRE THAT ALL
POSSIBLE CLAIMS BE RAISED ON PAIN OF FORFEITURE?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

REASONS FOR DENYING THE WRIT 2

 I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE
 DISTRICT COURT'S ERRONEOUS APPLICATION OF THE AEDPA
 AMENDMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE
 CALLS FOR REMAND REGARDLESS OF THE DETERMINATION OF THE
 ISSUES PRESENTED IN PETITIONER'S BRIEF 2

 II. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE
 ILLINOIS LAW DOES NOT REQUIRE A DEFENDANT TO SEEK REVIEW OF
 EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER
 TO AVOID FORFEITURE OF THOSE CLAIMS 3

 III. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE LACK
 OF UNIFORMITY AMONG THE CIRCUITS ON THE EFFECT OF FAILING TO
 INCLUDE A CLAIM IN A PETITION FOR LEAVE TO APPEAL TO A STATE
 SUPREME COURT IS LOGICAL WHEN THE STATES DO NOT HAVE UNIFORM
 RULES REGARDING SUCH PETITIONS 4

 IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE
 SEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT THE ILLINOIS
 RULE WHICH DISCOURAGED LITIGANTS FROM RAISING EVERY POSSIBLE
 CLAIM OF ERROR DID NOT REQUIRE THAT ALL POSSIBLE CLAIMS BE
 RAISED ON PAIN OF FORFEITURE 6

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Boerckel v. O'Sullivan, 135 F.3d 1194 (7th Cir. 1998) 1-7

Buck v. Green, 743 F.2d 1567 (11th Cir. 1984) 6

Dolny v. Erickson, 32 F.3d 381 (8th Cir. 1994) 7,8

Harris v. Reed, 489 U.S. 255 (1989) 4

Lindh v. Murphy, 117 S.Ct. 2059 (1997) 2

People v. Boerckel, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th
Dist. 1979) 2

People v. Edgeworth, 30 Ill. App. 3d 289, 332 N.E.2d 716 (1st
Dist. 1975) 3

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 2,3,7,8

RULES

Ill. S. Ct. R. 315(a) 4,5,6

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ON PETITION FOR WRIT OF CERTIORARI TO
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FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, decided on February 9, 1998, reversing the judgment of the district court that the first, second and third claims of Boerckel's habeas petition were procedurally defaulted was published. *Boerckel v. O'Sullivan*, 135 F.3d 1194 (7th Cir. 1998). The order denying Petitioner's petition for rehearing with suggestion for rehearing *en banc* was entered on March 20, 1998 and is included on page 17 of Petitioner's Appendix. The

decision of the district court on October 28, 1996 denying Boerckel's amended habeas petition was unpublished. The split-decision of the state appellate court affirming Boerckel's convictions was published. *People v. Boerckel*, 68 Ill. App. 3d 103, 385 N.E.2d 815 (5th Dist. 1979).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit reversing the dismissal of Respondent's habeas petition was entered on February 9, 1998. On March 20, 1998, Petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

I. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DISTRICT COURT'S ERRONEOUS APPLICATION OF THE AEDPA AMENDMENTS TO RESPONDENT'S CLAIM OF ACTUAL INNOCENCE CALLS FOR REMAND REGARDLESS OF THE DETERMINATION OF THE ISSUES PRESENTED IN PETITIONER'S BRIEF.

In its decision remanding Boerckel's case for a determination of the first three claims of his habeas petition on the merits, the Seventh Circuit stated that the district court should apply 28 U.S.C. § 2254 as it existed prior to the AEDPA amendments, in accordance with *Lindh v. Murphy*, 117 S.Ct. 2059 (1997). *Boerckel v. O'Sullivan*, 135 F.3d 1194, 1196 (7th Cir. 1998); Pet.App.4. The district court had previously ruled that it could not consider testimony regarding statements made by two

men that they had committed the rape for which Boerckel was convicted. Although the district court's order indicated that, "even if it believed the witnesses, it would only establish that others were present, not that Boerckel was not present," *id.*, that statement is simply dicta given the district court's previous determination that it could not consider the testimony. The fact that the Seventh Circuit observed that the pre-AEDPA version of § 2254 should be applied on remand indicates that the Seventh Circuit did not consider the district court's comment conclusive on the issue of whether actual innocence could be shown. Consequently, regardless of any determination of whether failing to present a claim to the Illinois Supreme Court is a procedural default, this case would have to be remanded to the district court making it an imperfect vehicle for the determination of the issues presented by the Petitioner.

II. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE ILLINOIS LAW DOES NOT REQUIRE A DEFENDANT TO SEEK REVIEW OF EACH AND EVERY CLAIM IN THE ILLINOIS SUPREME COURT IN ORDER TO AVOID FORFEITURE OF THOSE CLAIMS.

Illinois caselaw at the time of Boerckel's petition for leave to appeal to the Illinois Supreme Court and at present does not require that an issue be presented in a petition to the Illinois Supreme Court to avoid waiver. As the Seventh Circuit's opinion in this case discussed, *People v. Edgeworth*, 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975), stated that a petition for leave to appeal "is not necessarily an adversary

proceeding to which the application of ... the doctrine of waiver ... is appropriate." *Boerckel*, 135 F.3d at 1198; Pet.App.9.

III. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE LACK OF UNIFORMITY AMONG THE CIRCUITS ON THE EFFECT OF FAILING TO INCLUDE A CLAIM IN A PETITION FOR LEAVE TO APPEAL TO A STATE SUPREME COURT IS LOGICAL WHEN THE STATES DO NOT HAVE UNIFORM RULES REGARDING SUCH PETITIONS

Petitioner correctly points out that there is a conflict among the circuits regarding the effect of failing to include a claim in a petition for leave to appeal to a state supreme court. Petitioner argues that a rule requiring the presentation of all claims in a petition for discretionary review "would virtually obliterate any opportunity for a state's highest court to protect federally secured rights because it would leave state prisoners with little incentive to petition state supreme courts."

Pet.Brf.16. Petitioner also notes, citing *Harris v. Reed*, 489 U.S. 255, 269 (1989) (O'Connor, J. dissenting), that the exhaustion doctrine was intended to increase judicial efficiency. Pet.Brf.17.

Petitioner's brief ignores the fact that state rules regarding petitions to state supreme courts are not uniform. Although Petitioner's brief makes clear that most of the cases cited involved discretionary review by the highest state court, Petitioner does not discuss the criteria used by those states in the determination of whether to grant review. As the Seventh Circuit discussed in *Boerckel*, Ill. S. Ct. R. 315(a) states that

the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." *Boerckel*, 135 F.3d at 1200; Pet.App.12. The Seventh Circuit also noted that the fact that Illinois discourages litigants from raising all possible claims was evidence that Illinois does not consider it necessary to raise all possible claims to comply with exhaustion requirements. *Id.*

The Seventh Circuit correctly observed that, contrary to Petitioner's contention, its holding would not obliterate any opportunity for a state's supreme court to protect federally secured rights since presenting a claim to the state's supreme court cannot hurt and could potentially help the defendant. *Boerckel*, 135 F.3d at 1202; Pet.Brf.15. Petitioner's argument that requiring the presentation to the Illinois Supreme Court of all possible claims, a practice Illinois Supreme Court Rule 315(a) seems to discourage, will aid judicial efficiency is without merit. Judicial efficiency would in fact be hampered by the position urged by the Petitioner.

The three claims at issue in Boerckel's appeal to the Seventh Circuit were: 1) whether he knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary, and; 3) whether the evidence against him was insufficient to support a guilty verdict. *Boerckel*, 135 F.3d at 1196; Pet.App.4-5. Obviously, although important to the Respondent, these case-specific issues are not the type of issues Ill. S. Ct. R. 315(a) suggests the Illinois Supreme Court is likely to review. Presentation of the types of claims the Illinois Supreme Court is not interested in reviewing is simply a waste of resources for both the parties and the court. As the Eleventh Circuit has observed, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984).

IV. THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT WAS CORRECT IN DETERMINING THAT THE ILLINOIS RULE WHICH DISCOURAGED LITIGANTS FROM RAISING EVERY POSSIBLE CLAIM OF ERROR DID NOT REQUIRE THAT ALL POSSIBLE CLAIMS BE RAISED ON PAIN OF FORFEITURE

As discussed above, Ill. S. Ct. R. 315(a) discourages litigants from raising all possible claims in their petitions for leave to appeal. Illinois recognizes that its practice regarding petitions for leave to appeal is similar to this Court's

certiorari procedure. *Boerckel*, 135 F.3d at 1200; Pet.App.13.

"To remain consistent with certiorari practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief." *Id.* As the Seventh Circuit noted in its opinion:

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. ... Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

Boerckel, 135 F.3d at 1201; Pet.App.15. As the Seventh Circuit correctly stated, the right to raise an issue referred to in 28 U.S.C. § 2254 means more than the right to request an opportunity to be heard, it means a realistic, practical chance to have the issue considered on the merits. *Boerckel*, 135 F.3d at 1200 (citing *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994)); Pet.App.12. Comity is not offended by the result reached by the Seventh Circuit. However, the result urged by the Petitioner, requiring defendants to include all possible claims in petitions for leave to appeal to the state supreme courts without regard to either the state's criteria for determining what issues to review or state caselaw on the effect of failing to include a claim in a petition for leave to appeal, would offend the principle of comity. "[C]oncerns of comity are best met by not requiring

fruitless and burdensome petitions." *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994).

Adoption of the position urged by Petitioner would also have the undesirable effect of encouraging counsel in Illinois to disregard the factors set forth in Ill. S. Ct. R. 315(a) in selecting issues to present in a petition for leave to appeal. This result comes about because, under the approach urged by the Petitioner, an attorney who did not present an arguable issue of the type discouraged by Ill. S. Ct. R. 315(a) would be waiving his client's rights and thereby providing ineffective assistance.

CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,
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